

FILED
COURT OF APPEALS
DIVISION II

2017 JAN 23 AM 9:48

STATE OF WASHINGTON

BY C. No. 49716-6-II

DEPUTY

**THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

POTELCO, INC. and JEFF LAMPMAN,

Plaintiffs/Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

APPELLANTS' OPENING BRIEF

RIDDELL WILLIAMS P.S.
Gena M. Bomotti, WSBA #31896
Kristina Markosova, WSBA #47924
Attorneys for Appellants Potelco, Inc. and Jeff Lampman
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154-1192
Phone: (206) 624-3600
Facsimile: (206) 389-1708

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	3
A. STATEMENT OF FACTS	3
B. PROCEDURAL BACKGROUND.....	5
IV. ARGUMENT	6
A. STANDARD OF REVIEW	6
B. POTELCO REQUESTED AN INSPECTION AS REQUIRED UNDER WAC 296-46B-901	6
C. MR. LAMPMAN SATISFIED HIS DUTIES AS ELECTRICAL ADMINISTRATOR	9
V. CONCLUSION.....	11

TABLE OF AUTHORITIES

Page

STATE COURT CASES

<i>Dep't of Labor and Indus. v. Tyson Foods, Inc.</i> , 143 Wn. App. 576, 178 P.3d 1070 (2008)	6
<i>J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007)	6
<i>In re Longview Fibre, BIIA Dckt. No. W0321</i> , 2003 WL 23269365 (2003)	6
<i>Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.</i> , 125 Wn. App. 843, 106 P.3d 776 (2005)	6
<i>Stuckey v. Dep't of Labor and Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996)	6
<i>State v. Barnes</i> , 153 Wn.2d 378, 103 P.3d 1219 (2005).....	10
<i>State v. Bash</i> , 130 Wn.2d 594, 925 P.2d 978 (1996).....	10

STATE STATUTORY AUTHORITIES

RCW 49.17.150	6
RCW 49.17.150(1).....	6
RCW 19.28.061(5)(b)	9, 10, 11
WAC 296-46B-901(9)(a).....	7, 8

I. INTRODUCTION

The Department of Labor and Industries issued Potelco Citation No. EBOES00792 for allegedly failing to request an inspection within three business days after completing electrical work, as required under WAC 296-46B-901(9)(a). The Department also issued Potelco's Electrical Administrator, Jeff Lampman, Citation No. EBOES00793 for allegedly failing to ensure that Potelco complied with the electrical laws of Washington State, as required by RCW 19.28.061(5)(b). On November 20, 2015, the State of Washington Electrical Board issued a decision upholding the Citations.

However, the testimony presented at hearing established that Potelco properly requested an inspection. Because Potelco complied with all relevant electrical rules, Mr. Lampman necessarily satisfied his duties under RCW 19.28.061(5)(b). Furthermore, holding Mr. Lampman liable for the actions of other employees would subject him to strict liability, which is not the intent of RCW 19.28.061(5)(b).

As such, Potelco and Mr. Lampman respectfully request that the Court reverse the Electrical Board's decision to affirm the Citations, because Potelco properly requested and received an inspection of its White River worksite, and Mr. Lampman fulfilled his duties as an electrical administrator.

II. ASSIGNMENTS OF ERROR

Potelco respectfully asserts that the Superior Court erred in affirming Findings of Fact No. 2.1 and 2.2, and in adopting Conclusion of

Law Nos. 5.4, 5.6, and 5.11 – 5.15, as set forth in the Board’s Decision and Order, because these Findings of Fact were not supported by substantial evidence and did not in turn support the Conclusions of Law. Potelco also respectfully asserts that the Superior Court erred in granting statutory attorneys’ fees to the Department as the prevailing party. Specifically:

Assignment of Error No. 1: The Superior Court erred in adopting Finding of Fact No. 2.1.

Statement of Issues Pertaining to Assignment of Error No. 1:
Did the Superior Court err in adopting Finding of Fact No. 2.1 when substantial evidence shows that Potelco requested an inspection?

Assignment of Error No. 2: The Superior Court erred in adopting Finding of Fact No. 2.2.

Statement of Issues Pertaining to Assignment of Error No. 2:
Did the Superior Court err in adopting Finding of Fact No. 2.2 when substantial evidence shows that Mr. Lampman fulfilled his duties as an electrical administrator?

Assignment of Error No. 3: The Superior Court erred in adopting Conclusion of Law No. 5.4.

Statement of Issues Pertaining to Assignment of Error No. 3:
Did the Superior Court err by adopting Conclusion of Law No. 5.4 when the substantial evidence shows that Potelco requested an inspection and did not violate WAC 296-46B-901?

Assignment of Error No. 4: The Superior Court erred in adopting

Conclusion of Law No. 5.6.

Statement of Issues Pertaining to Assignment of Error No. 4:

Did the Superior Court err by adopting Conclusion of Law No. 5.6 when the substantial evidence shows that Lampman fulfilled his duties as an electrical administrator and did not violate RCW 19.28.061(5)(b)?

Assignment of Error No. 5: The Superior Court erred in adopting Conclusions of Law Nos. 5.11-5.15.

Statement of Issues Pertaining to Assignment of Error No. 5:

Did the Superior Court err by adopting Conclusions of Law Nos. 5.11-5.15 when the substantial evidence shows that Potelco and Mr. Lampman did not violate the cited standards?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On July 17, 2013, Potelco was replacing a medium voltage power line at a school in the White River School District. Clerk's Papers ("CP") at 614 – 615. Potelco obtained an electrical permit before it began replacing the line. *Id.* at 581, 614.

A Department Inspector, John Boespflug, was performing inspections nearby, and noticed Potelco's worksite, so he decided to stop and conduct an "inspection" of the worksite. *Id.* at 578 – 9. Inspector Boespflug asked Potelco employees a series of detailed questions, and carefully reviewed the materials Potelco was using. *Id.* at 627. Potelco's employees responded to his inquiries, and notified Inspector Boespflug that they were nearly finished replacing the line. *Id.* at 583, 635. After

inspecting the worksite, Inspector Boespflug had no concerns with Potelco's work – he described it as “competent” and “safe.” *Id.* at 598. He then authorized Potelco to energize the line when they finished. *Id.* at 634 – 5. Based on his interactions with Inspector Boespflug, Potelco's foreman, Mark Langberg, believed that Potelco had requested a final inspection as required:

I was assuming he was doing an inspection.
He asked me all the questions. He inspected
everything we had. He asked for a license.
He inspected the test equipment. He
inspected – he checked for the UL stickers
or – if there was stickers on all of the
equipment.

Id. at 627.

A couple of months later, Inspector Boespflug called Potelco's Electrical Administrator, Jeff Lampman, and stated that Potelco still needed to request an inspection for the work performed on July 17. CP at 585. Following that conversation, Potelco made yet another request for inspection. *Id.* at 656. Importantly, however, Inspector Boespflug *did not* re-inspect Potelco's worksite, because he “do[es] not like to open energized transformers.” *Id.* at 663. Instead, he “gave it final approval” after confirming with the Department that the connectors used by Potelco were appropriate. *Id.* at 663-4. He needed no additional information from Potelco in order to do so. *Id.* at 666.

The Department subsequently issued Potelco Citation No. EBOES00792 for allegedly failing to request an inspection within one day

of energizing the school district's power line. The Department also issued Mr. Lampman Citation No. EBOES00793 for allegedly failing to ensure that Potelco complied with the electrical laws of Washington State. The Department, however, did not consider any of the efforts Mr. Lampman had taken to ensure compliance with those rules. CP at 601. Potelco's alleged failure to request an inspection is the only reason the Department issued Mr. Lampman a citation. *Id.* at 601 – 2. In fact, the Department's practice is to issue an employer's electrical administrator a citation every time an employer is issued a citation. *Id.* at 602. The Department seemingly believes an electrical administrator is strictly liable for any alleged violation committed by an employer.

B. PROCEDURAL BACKGROUND

Potelco and Mr. Lampman timely appealed the Citations to the Office of Administrative Hearings ("OAH"). The OAH held a hearing on October 14, 2014, in Tacoma, Washington. On November 14, 2014, the OAH issued an initial order affirming the Citation. CP 551 – 560. Potelco and Mr. Lampman timely appealed to the Electrical Board, which held an appeal hearing on July 30, 2015. By a vote of 7-5, the Electrical Board decided to affirm the OAH's initial order, and it issued Potelco a final order on November 20, 2015 reflecting that decision. CP 456 – 458.

On December 17, 2015, Potelco appealed the Electrical Board's Decision and Order to the Pierce County Superior Court. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Pierce County Cause No. 15-2-14603-9, Notice of Appeal to Superior Court). Although Judge Edmund Murphy noted that

his decision to affirm Potelco's Citation was a "close call," he ultimately entered an order affirming the Board's final Decision and Order on October 28, 2016. CP 787 – 790. Potelco timely appealed to this Court on November 28, 2016. (*Potelco, Inc. v. Dep't of Labor and Indus.*, Pierce County Cause No. 15-2-14603-9, Notice of Appeal to Washington State Court of Appeals, Division II).

IV. ARGUMENT

A. STANDARD OF REVIEW

When reviewing Board rulings, this Court sits in the same position as the Superior Court and reviews the Board's decision directly. *Dep't of Labor and Indus. v. Tyson Foods, Inc.*, 143 Wn. App. 576, 581, 178 P.3d 1070 (2008); *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). The Board's findings must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776 (2005). Conclusions of law must be appropriate based on the factual findings. RCW 49.17.150; *Martinez Melgoza*, 125 Wn. App. at 847-48. Courts review questions of law, such as the Board's interpretation of a statute, de novo. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

B. POTELCO REQUESTED AN INSPECTION AS REQUIRED UNDER WAC 296-46B-901

Employers must request inspections within three days of completing electrical work, or within one day of energizing electrical lines:

Requests for inspection must be made no later than three business days after completion of the electrical/telecommunications installation or one business day after any part of the installation has been energized, whichever comes first.

WAC 296-46B-901(9)(a). The regulation provides no guidance on the specific method or procedure for requesting an inspection. The rules do not require the request to be in writing or any other particular form. The only requirement is that the inspection be made within a certain time frame.

Inspector Boespflug visited Potelco's worksite and inspected its work. CP at 578 – 9, 627. He identified no problems with the work done by Potelco's crew. *Id.* at 598. The crew informed him that they would complete the work shortly. *Id.* at 583, 635. Inspector Boespflug indicated that the crew could energize the line that day. *Id.* at 634 – 5. The conversation between Potelco's crew and inspector Boespflug was reasonably interpreted by Potelco's crew as a request to inspect their final work, as further stated by five members of the Electrical Board. *Id.* at 627; *see* quotes blow. Thus, Potelco requested an inspection within three business days after completing its work and within one day after the line

was energized. The electrical rules do not prohibit an employer from requesting an inspection while an inspector is on-site. Potelco therefore made a proper request for inspection under WAC 296-46B-901(9)(a), and Citation No. EBOES00792 should be vacated. Five members of the Electrical Board agreed.

- Board Member Don Baker – Electrical Contractor¹:

I believe that Potelco received an inspection that day... why would you request an inspection prior to completion of work? We do that all the time... having an inspection prior to completion is normal in our industry. I don't think I can support the citation for the failure to call for an inspection...we have to look at the intent of the law. And the intent isn't that everyone requests inspections. The intent is that you get an inspection. And they did get an inspection. I'm trying to apply something from the common sense department here. CP at 361, 365 – 6, 374, 383 – 4.

- Board Member Dominic Burke – Electrical Contractor:

I agree that the three-days inspection was performed within the confines of the rule. *Id.* at 369.

- Board Member Dylan Cunningham – Licensed Professional Electrical Engineer:

¹ Information about the Board Members and their affiliations is available at <http://www.lni.wa.gov/tradeslicensing/electrical/elecboard/members/default.asp> (last accessed January 18, 2017).

I agree ... that the citation for failure to request is kind of a moot point. The inspection happened. It happened before it was ever requested. *Id.* at 375 – 6.

- Board Member Bobby Gray – Electrical Contractor:

[T]he rules do not require any particular method. It doesn't require a formal request. It doesn't require a phone call. It doesn't require on-line. So I can easily see how the people on the job thought they were requesting that final inspection. *Id.* at 373.

- Board Member Kevin Schmidt – Telecommunication Contractor:

[Inspector Boespflug] said 'I would return and sign' the inspection, which would lead me to believe in my experience that he obviously felt that the installation was proper and had inspected it. CP at 364.

C. **MR. LAMPMAN SATISFIED HIS DUTIES AS ELECTRICAL ADMINISTRATOR**

Under RCW 19.28.061(5)(b), an employer's electrical administrator must "[e]nsure that all electrical work complies with the electrical installation laws and rules of the state." As discussed above, Potelco adequately requested an inspection as required under Washington's electrical rules. Thus, Mr. Lampman satisfied his duties under RCW 19.28.061(5)(b).

In addition, Mr. Lampman has taken affirmative steps to ensure compliance with the electrical rules. For example, prior to this citation, Mr. Lampman conducted an electrical safety presentation for Potelco's employees. CP at 336 – 7, 644 – 5. Among other things, the presentation

covered the requirement to request an inspection for electrical work. *Id.* Mr. Lampman then instituted a system to ensure compliance with this particular rule – the Potelco employee who obtains an electrical permit is generally responsible for requesting the final inspection. CP at 654. In this case, that employee was Glen Thomas. *Id.* Mr. Thomas had previously handled permits for Potelco and had always complied with the relevant rules. *Id.* at 648. Mr. Lampman therefore took all reasonable steps to ensure compliance with the electrical rules, even if Potelco’s employees had not requested an inspection on-site (which they did). Holding Mr. Lampman liable for the actions of other employees would subject him to strict liability, which is not intended under RCW 19.28.061(5)(b).

Strict liability statutes are generally disfavored. *See State v. Barnes*, 152 Wn.2d 378, 103 P.3d 1219 (2005). When the language of the statute does not specifically address strict liability, the Court may look to the legislative history and legislative intent to determine whether the legislature intended to create a strict liability statute. *See State v. Bash*, 130 Wn.2d 594, 925 P.2d 978 (1996).

The language of RCW 19.28.061(5)(b) shows no indication of strict liability. Instead, its language sets forth a broad requirement that an employer’s electrical administrator must ensure that all electrical work complies with the installation regulations and state laws. A plain language reading of this requirement indicates that there are various steps an electrical administrator can take to ensure compliance; it does not indicate

that, despite taking steps to ensure compliance, an electrical administrator is liable for all mistakes made on the work site.

Furthermore, nothing in the legislative history indicates that the Legislature intended to hold the electrical administrator strictly liable for all company violations. *See* WA F. B. Rep., 2006 Reg. Sess. S.B. 6225.

Lastly, interpreting RCW 19.28.061(5)(b) as a strict liability statute would unfairly subject an electrical administrator to strict liability for the actions of other persons.

Although the Department and the Electrical Board have agreed that RCW 19.28.061(5)(b) is not a strict liability statute, their analysis nonetheless holds Mr. Lampman to a strict liability standard.

V. CONCLUSION

For the reasons discussed above, Potelco, Inc. and Jeff Lampman respectfully request the Court to vacate Citation Nos. EBOES00792 and EBOES00793.

DATED this 20th day of January, 2017.

RIDDELL WILLIAMS P.S.

By 

Gena M. Bomotti, WSBA #31896
Kristina Markosova, WSBA #47924
Attorneys for Appellants Potelco, Inc. and
Jeff Lampman

CERTIFICATE OF SERVICE


I, Ashley Rogers, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Appellants Potelco, Inc. and Jeff Lampman in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On January 20, 2017, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email and mail, and addressed as follows:

James P. Mills, WSBA #36978
Assistant Attorney General
Washington Attorney General's Office
Labor & Industries Division
1250 Pacific Ave., Ste. 105
P.O. Box 2317
Tacoma, WA 98401-2317

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 20th day of January, 2017.


Ashley Rogers

2017 JAN 23 AM 9:48

CERTIFICATE OF SERVICE STATE OF WASHINGTON

The undersigned hereby certifies on the 21st day of December, 2016, that I caused a true and correct copy of the foregoing document to be served on the following, via the method indicated:

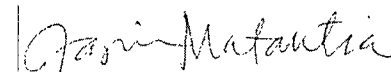
James P. Mills, AAG
Office of the Attorney General
P.O. Box 2317
Tacoma, WA 98401
jamesm7@atg.wa.gov
DesiraeJ@ATG.WA.GOV

Via Email and Mail

Washington State Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Via Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on December 21, 2016, at Seattle, Washington.



Jazmine Matautia